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4 IN THE UNITED STATES DISTRICT COURT

5 FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

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9 _____)
10 SCO GROUP, et al.,)
11)
12 Plaintiff,) Case 2:03-CV-294
13 vs.)
14 INTERNATIONAL BUSINESS MACHINES)
15 CORPORATION,)
16 Defendant.)
17 _____)

18

BEFORE THE HONORABLE DALE A. KIMBALL

19

MARCH 7, 2007

20

REPORTER'S TRANSCRIPT OF PROCEEDINGS

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MOTION HEARING
DAILY COPY TRANSCRIPT

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1 SALT LAKE CITY, UTAH, WEDNESDAY, MARCH 7, 2007

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3 THE COURT: We're here this afternoon in the matter
4 of the SCO V. IBM, 2:03-CV-294. For plaintiff, Mr. Brent
5 Hatch, Mr. Ted Normand, Mr. Stuart Singer. For defendant,
6 Mr. David Marriott, Ms. Amy Sorenson, Mr. Peter Donaldson,
7 Mr. Todd Shaughnessy, Mr. Joseph Kriesh and Mr. Jefferson
8 Bell.

9 All right. We have IBM's motion for summary
10 judgment on its claim for declaratory judgment of
11 non-infringement.

12 Is that the one you want to do first?

13 MR. MARRIOTT: It is, Your Honor.

14 THE COURT: And are you arguing?

15 MR. MARRIOTT: I am.

16 THE COURT: And Mr. Singer?

17 MR. SINGER: I'll be arguing.

18 THE COURT: How long is this one supposed to take?

19 MR. MARRIOTT: I believe 45 minutes a side, Your
20 Honor.

21 MR. SINGER: That's correct.

22 THE COURT: All right. Go ahead, Mr. Marriott.

23 MR. MARRIOTT: Thank you.

24 Your Honor, we have, as always, a book. If I may
25 approach.

1 THE COURT: Yes.

2 MR. MARRIOTT: After promoting Linux for nearly a
3 decade, Your Honor, SCO changed management and undertook a
4 series of legal attacks against it. And despite the fact that
5 it contributed Linux and it induced thousands to use it, it
6 threatened users of Linux with infringement including IBM.
7 And to put an end to the fear, the uncertainty and the doubt
8 generated by those allegations, IBM filed a claim asking this
9 Court to declare that the kernel of Linux does not infringe
10 the copyrights purportedly owned by SCO.

11 Now, when IBM last moved for summary judgment on
12 this issue, Your Honor, which motion Your Honor denied as
13 premature, you observed that SCO had produced no competent
14 evidence in support of its allegations of infringement. And
15 now four years after the commencement of this suit, nothing
16 has changed. There's no competent evidence to support the
17 conclusion of infringement.

18 And as illustrated, Your Honor, at Tab 1 of our
19 book, SCO's allegations and infringement failed for five
20 independent reasons, any one of which is a basis for summary
21 judgment.

22 Now, before I come to those, Your Honor, if I may,
23 by way of background, let me say this. As you know, for years
24 SCO pronounced that there were more than a million lines of
25 code controlled by it in the Linux kernel, as we illustrated

1 in Tab 2. At the end of the day, however, when all is said
2 and done, there are 326 lines of code in the Linux kernel
3 which supposedly infringed SCO's alleged copyrights. That's
4 it. 326 lines of code in the Linux kernel.

5 The allegedly infringing code is trivial in size,
6 Your Honor, less than one 5,000th of a percent of the kernel.
7 And as we illustrated at Tab 3 of the book, it is equivalent
8 of one spectator in 20,000 in an arena the size of the former
9 Delta Center.

10 The actual code, Judge, appears at Tab 4, Tabs 4
11 and 5 of the book and here on the easel to my left and Your
12 Honor's right. And so that it's perfectly clear, Your Honor,
13 IBM did not contribute a single one of these 326 lines of code
14 to Linux. Most of it was there long before IBM had anything
15 to do with Linux. And as I will show Your Honor, much of it
16 is there because of SCO and its support for Linux.

17 Now, portions, Your Honor, of the lines of these
18 326 lines of codes are not actually coded, although they are
19 comments. And if you look either in your binder or on the
20 chart, you will see that that which is in yellow represents
21 comments not code.

22 Now, as for the actual code, Judge, 11 out of the
23 12 files that are at issue here consists of what is called
24 header file code. And, in fact, it's not executable file,
25 executable code at all. It does essentially nothing in terms

1 of being executed. It is interface information, Your Honor.
2 It describes how information is shared among the components of
3 an operating system.

4 And as we show at Tabs 6 through 8 of the book,
5 Your Honor, this header file code consists of header file
6 information of three types. And just so that it's clear
7 exactly what we're talking about, let me describe briefly what
8 each of these three types is.

9 First type, Your Honor, are so-called #define
10 statements. The second are structure declaration, and the
11 third are function prototypes. Let me just say a word briefly
12 about each those.

13 A #define, Your Honor, specifies a shorthand or
14 abbreviations. It put it differently, it simply names and
15 numbers associated with anything you might want. Anything
16 that could happen in connection with a computer an error might
17 have associated with it a name and a number. Of the 326 lines
18 that are at issue, 121 of those lines are #define statements.

19 And to give Your Honor an example of what a #define
20 statement is, consider, if you would, the abbreviation for the
21 10th Circuit Court of Appeals. 10th Cir. The Cir, Your
22 Honor, is the name that would be assigned, and the 10 is the
23 number that is assigned. If you want to take an actual
24 example of the code, if you would look under the first file,
25 the first line says, #define EPERM, Your Honor. And what that

1 says is that if there is a user that attempts to access a file
2 to which that user doesn't have permission, the system will
3 indicate there is an error, an error for lack of permission.

4 So the E for error, the PERM for permission and the
5 number 1 is associated with that. That is what a #define
6 statement is, Your Honor, much like Circuit 10th.

7 If you take a look at the next type of information
8 in these files, structure declarations. They specify, Judge,
9 how information is to be stored and how it is to be displayed.
10 To put it differently, a structure declaration is a collection
11 of related data values.

12 And of the 326 items that are at issue in this
13 case, 164 lines of them are structure declarations. There's
14 somewhere south of 20 or so structure definitions within those
15 lines.

16 And to continue the case citation analogy, Your
17 Honor, structure declaration is like the format for a case.
18 If you had a case, its format would be name of case, reporter,
19 court and date. That is in effect a structure declaration.

20 And if you want to take an actual example from this
21 code, Your Honor, if you look at file Number 10 there, it
22 provides that, one of the structure declarations there
23 provides that when specifically identifying a computer system,
24 you should say what the machine is, what version it is, what
25 release it is and the type of machine on which it runs. Those

1 are examples of things that come in structure declarations.
2 It's the operating system saying, what kind of machine am I
3 writing on? Well, it's this kind of machine. It's that
4 version. It's that release. That's what a structure
5 declaration does, Your Honor. It allows users to understand
6 how components of the operating system interrelate.

7 Finally, Judge, function prototypes. It specifies
8 what operations may be performed, using what inputs and
9 producing what outputs. And of the 326 lines of codes that
10 are at issue, there are 12 function prototypes.

11 So if you were to go to a cite, Your Honor, like
12 Westlaw and you were to try to use the find function, the find
13 function which has you put in certain parameters in a case
14 would allow you to find that case. And that is in effect what
15 a function prototype is.

16 So if you look at the chart, the second blue line,
17 Your Honor, Line 67 of file number 5, you'll see a function
18 prototype called message send. And that says that if you
19 provide the message recipient ID and the message and the
20 length of the message, any extra information, like if you
21 wanted it to be sent high priority, that will tell you whether
22 the message was properly sent. And if it doesn't go through,
23 an error will register. And you might get that like an EPERM
24 number 1.

25 Now, finally, Your Honor, before coming to the five

1 bases of summary judgment, let me just underscore, that though
2 this is IBM's motion, it is SCO as the party asserting
3 infringement that bears the burden to establish that IBM's
4 Linux activities have infringed the alleged copyrights. And
5 at Tab 9 in the book we lay that out for the Court.

6 Point number one, Your Honor. Summary judgment
7 should be entered in favor of IBM because SCO cannot establish
8 unauthorized copying by IBM of copyrights owned by SCO. And
9 there are three separate reasons why that's the case, and with
10 Your Honor's permission I want to deal with just two of them
11 today.

12 The first reason is, Your Honor, despite this
13 Court's order that SCO tell IBM exactly what it is that IBM
14 has supposedly done to infringe on these 326 lines of code, no
15 information has been provided in SCO's final disclosures. And
16 a second reason is, Your Honor, the copyrights at issue on
17 this record we submit are owned by Novell, not by SCO. And
18 third, Your Honor, SCO transferred any rights it had in the
19 code that is at issue to UnitedLinux for reasons we discussed
20 at the last hearing, and I'll reiterate here.

21 I'd like to, Your Honor, if I may take the first
22 and third of those and to defer the second to another day. To
23 the question whether Novell or SCO owned these copyrights will
24 be addressed in the Novell litigation. It's briefed here, and
25 I'm happy to answer any questions Your Honor has about it, but

1 I think in the interest of time I'll focus on 1 and 3.

2 That brings me to 1, Your Honor. As we will see
3 at Tab 11 of the book, SCO has repeatedly by this Court and
4 Magistrate Judge Wells been ordered to identify with
5 specificity its allegations of infringement to tell IBM how it
6 is supposedly IBM has infringed this code. And that isn't in
7 the final disclosures or any of SCO's interrogatories
8 responses provide that information. And if Your Honor looks
9 at Tab 12 in the book, you will see in IBM's, its support of
10 IBM's motion for summary judgment, we laid out the fact that
11 SCO failed to provide this information.

12 And what we got in response, Your Honor, is in
13 effect, not a demonstration of where the information
14 supposedly was provided, but yet another statement that SCO
15 was not obligated to provide the information provided.

16 As shown at Tab 13, again, Your Honor, this Court
17 and Magistrate Judge Wells have been clear. If it wasn't
18 described with specificity in the final disclosures, it's out
19 of the case. And respectfully, no information has been
20 provided to describe the allegations of infringement. And for
21 that reason alone, Your Honor, summary judgment should be
22 entered in favor of IBM.

23 Now we come to the third reason, I'm skipping the
24 second, third reason why SCO cannot prove that IBM has
25 infringed copyright owned by SCO, is that SCO transferred any

1 interest, any ownership interest it had in the allegedly
2 infringed code to the UnitedLinux, LLC.

3 Let me walk Your Honor through that. As you'll
4 recall from the last year in May of 2002, SCO partnered with
5 other Linux distributors to form a joint venture called
6 UnitedLinux. And it was formed to streamline, in effect
7 standardize Linux distributions. Each member of that
8 UnitedLinux effort signed an agreement under which they
9 assigned their intellectual property rights in the joint
10 development product to the UnitedLinux, LLC.

11 And as we discussed in previous arguments, Your
12 Honor, SCO's SCO Linux 4 was the joint development product of
13 UnitedLinux of SCO. And as illustrated at Tab 19, Your Honor,
14 of the book you'll see that the joint development contract
15 defines the UnitedLinux software to be, quote:

16 At any implementation of the UNIX
17 operating system developed and integrated under
18 any conditions of the JDC.

19 Both of the appendices of the JDC explain that to
20 mean an implementation based on a modified version of the
21 Linux kernel. And as we illustrate at Tab 20 of the book,
22 Your Honor, SCO has admitted that its SCO Linux 4 was a
23 product developed pursuant to the JDC. And in a press release
24 of 19 November 2002, SCO stated, quote:

25 SCO Linux 4.0 is based upon UnitedLinux 1.0,

1 the core standard base Linux operating system,
2 development in an industry initiative to
3 streamline Linux development, and so on.

4 As we show at Tab 21, Your Honor: SCO Linux 4 powered by
5 UnitedLinux included the 326 lines that are at issue.

6 It follows, Your Honor, that the 326 lines at issue
7 were in the software development pursuant to the JDC. And so
8 unless the 326 lines of code were excepted from assignment,
9 SCO has no interest or right in those and cannot pursue
10 against IBM or any other claim for copyright infringement.

11 SCO had pursuant to these agreements, Your Honor,
12 its list of excluded technologies, a specific list. And as is
13 demonstrated at Tab 22, Your Honor, how their list, the
14 successor of the SCO, did not include the 326 lines of code
15 that are at issue here. And as a result, that code is not
16 owned by SCO, and it may not pursue a claim against IBM again
17 or any other for infringement.

18 Point 2, Judge. IBM has a license. In fact, it
19 has multiple licenses to the 326 lines of code at issue, as we
20 illustrate at Tab 25 of our book. Now, time won't allow
21 discussion of each of the five licenses that we've briefed,
22 and so with Your Honor's permission what I'd like to do is
23 focus on the two of the licenses that have the broadest
24 coverage, the two licenses that cover every single one of the
25 326 lines of codes that are at issue. And that's, one, the

1 IBM strategic business agreement between Caldera and IBM; and
2 second, the GNU general public license of GPL. And again, I
3 reiterate, all 326 lines of codes were included by SCO in
4 Linux products as distributed under these licenses. So with
5 that predicate, let me take each of these licenses in turn,
6 Your Honor.

7 First, the strategic business agreement. As shown
8 at Tab 26, that was an agreement between IBM and Caldera, and
9 it included a license that provided as follows: Quote --
10 well, almost quote. It provided that Caldera would grant IBM
11 a, quote:

12 Worldwide, perpetual, irrevocable, fully
13 paid-up license to prepare and have prepared
14 derivative works of free existing materials and to
15 use, have used, execute, reproduce, transmit, perform,
16 transfer, distribute and sublicense preexisting
17 materials for their derivative works and to grant
18 others rights under this subsection.

19 So what are preexisting materials, Your Honor, and
20 their derivatives? If you turn to Tab 27, we follow the chain
21 from one definition to the next that demonstrates that these
22 326 lines of code were in what was licensed to IBM.

23 As you'll see, Your Honor, preexisting materials
24 are defined in relevant part as items contained within a
25 deliverable. A deliverable is defined as, expressly

1 identified as a deliverable in the statement of work. The
2 statement of work in term provides the deliverables include
3 license works which are defined to include packaged license
4 works, and packaged license works are further defined in
5 Exhibit A, Your Honor, which describes the packaged license
6 work as the OpenLinux products of SCO including eDesktop,
7 eServer products. The SCO OpenLinux product line was later
8 named, Your Honor, SCO Linux 4 with release of that product.
9 But was in any event a derivative of SCO OpenLinux products as
10 we show at Tab 28.

11 So SCO granted to IBM, Your Honor, a license to the
12 326 lines of codes at issue under the strategic business
13 agreements between IBM and SCO. And again, every one of the
14 lines of code at issue is in there.

15 Let me drop a footnote, if I may, and I'll come
16 back to this. This same agreement, Your Honor, provided IBM a
17 warranty with respect to these 326 lines of codes. It says:

18 SCO represented that they do not infringe
19 any intellectual property rights of any third
20 party.

21 They do not infringe any intellectual property
22 rights of any third party. And at the time, Your Honor, by
23 SCO's reasoning it was Santa Cruz -- again, we disagree with
24 that -- but it was Santa Cruz that owned the copyrights that
25 SCO now claims it can assert against IBM.

1 That brings me to the GPL. In addition to granting
2 IBM a license under the SBA, Your Honor, IBM also has a
3 license from SCO to these 326 lines under the GPL. The GPL in
4 its preamble and elsewhere provides that if you distribute
5 copies of a program licensed under the GPL, that you, quote,
6 must give your recipients all the rights that you have.

7 It further provides in its preamble that a license
8 gives you the legal permission as a recipient of code
9 distributed under it to copy, distribute and modify the
10 software. And again, in Section One and Section Two in
11 Section Three, a license is given to the code distributed
12 under the GPL to do exactly that, which purportedly SCO
13 accuses IBM of doing, as I say precisely what IBM was supposed
14 to have done has never been disclosed, Your Honor.

15 There is no dispute, I respectfully submit, that
16 SCO's Linux products were distributed under the GPL. And if
17 you take a look at Tab 32, you will see in SCO's own words the
18 following statement:

19 All of SCO's Linux distributions prior to and
20 after May 2003 were made under the GPL.

21 Therefore, IBM, Your Honor, has not one license,
22 but two licenses to the material issue without regard to the
23 three licenses that I'll leave to the briefing.

24 Third point, Your Honor. SCO is estopped from
25 pursuing against IBM a claim for copyright infringement. SCO

1 has a long history, Your Honor, as a supporter of Linux, and
2 it is that history that precludes precisely the conduct which
3 indicates here, to sue for infringement relating to Linux.
4 SCO was not only founded as a Linux company, Your Honor, it
5 distributed and it profited from Linux including those lines
6 of code for a very long time.

7 And as we demonstrate at Tab 43, SCO's various
8 Linux products again included exactly this code, and SCO
9 employees have testified to that effect. Ralf Flaxa, for
10 example, who was head of SCO's development in Europe,
11 testified, quote:

12 While employed at Caldera, I was aware that
13 the allegedly infringing material was present in
14 Linux. I know so because of my familiarity with
15 Linux and also because Caldera is incorporated in
16 its Linux products.

17 Now as I said, Your Honor, the code was distributed
18 under the GPL. In addition to that fact that that grants IBM
19 a license, it also has an affect with respect to estoppel,
20 because again, the license provides that that which one gives
21 to others under the GPL, one gives that person's rights in
22 that material to those other persons.

23 So SCO wasn't just family in the Linux company.
24 They didn't just distribute it under the GPL. They produced
25 what they described as an award winning set of Linux products

1 that made it, in their words, a leader in the movement toward
2 the adoption of Linux. And again, based on the exact code
3 that is at issue. So if you take a look at Tab 46 of the
4 book, you will see a list of some of the awards that Caldera
5 won for its promotion and sponsorship of Linux. Linux Show's
6 Best Distribution of the Millennium. Linux Journal's Product
7 of the Year award and CNET Editor's Choice Award.

8 THE COURT: Where does this illustration come from
9 in 46? This cup with all this money?

10 MR. MARRIOTT: Someone on our team made that up,
11 Your Honor.

12 As a leader in the Linux community, SCO played an
13 important role in the standardization of UNIX. And putting
14 aside UnitedLinux, which I'll come back to, SCO was the first
15 signatory of a document proposing the so-called Linux
16 standards base. Santa Cruz also, SCO's purported successor,
17 was in support of that. And the Linux standards base was an
18 attempt to define the common core of components that represent
19 the Linux operating system.

20 And the LSB at issue here, Your Honor, required
21 inclusion in Linux of the code that we're talking about. SCO
22 sponsored the standard. The standard required the code. And
23 as SCO former CEO, Your Honor, Ransom Love, has testified,
24 quote:

25 To facilitate the porting of Linux to

1 application written primarily for UNIX-based
2 operating systems, Caldera, Inc., worked to make
3 Linux products compliant with various UNIX
4 standards, including the X/Open brand for UNIX 95,
5 and the POSIX.1 specification.

6 So again the allegedly infringing is there in part
7 because of the SCO sponsored the standardization of Linux.

8 Now, in fact, Your Honor, SCO was the only notable
9 support of one of the items as to which they accused IBM of
10 infringing. STREAMS material, which, in fact, isn't even in
11 the kernel. But SCO required the use of this material as
12 support for its Netware for Linux products. The Linux
13 community opposed the inclusion of this material in the
14 kernel. But despite that opposition, SCO collaborated with
15 others to have it included, made it available for download
16 from its website. And now that very same material that it
17 accuses IBM and others of infringing is there because in
18 effect SCO put it there, Your Honor.

19 Santa Cruz, SCO's purported predecessor, hosted and
20 Caldera participated in a 1997 meeting to perform a group
21 called 86Open, which we show at Tab 51. Mr. Torvalds proposed
22 then creating a new application format to replace the existing
23 ELF format that was implemented in Linux.

24 Santa Cruz opposed the proposal, however, and
25 insisted instead on a Linux ELF so the programs could more

1 easily run on the SCO UNIX. The ELF standard was adopted at
2 least in part because of SCO's effort. And it is that precise
3 standard which SCO now contends represents an act of
4 infringement in the Linux kernel.

5 In 1999, Santa Cruz commissioned a study to compare
6 Linux to UNIX. And according to the chief SCO engineer, that
7 study found certain similarities between UNIX and Linux. But
8 it found that the similarities were understandable and
9 acceptable. Management of the current SCO, however, has
10 publicly taken the position that that memo showed there was
11 something wrong with Linux. And despite their view, however,
12 that something was wrong with Linux as indicated by that memo,
13 both Santa Cruz, Your Honor, and SCO continued over the course
14 of the following number of years supporting and promoting
15 Linux despite the supposed concern convinced by this
16 memorandum. As SCO's former CEO put it in 2001 when Caldera
17 acquired certain UNIX assets, quote:

18 We did not care whether UNIX source code had
19 been included in Linux improperly, and we did not
20 at any point disclose that there might be any
21 problem with Linux.

22 At the very same time, Your Honor, that Santa Cruz
23 was conducting this analysis with Mr. Swartz, Caldera was
24 approaching IBM about entering into this strategic business
25 agreement that I discussed with Your Honor a few moments ago.

1 And that courtship resulted in, culminated in the execution of
2 that strategic business plan. I explained previously how that
3 agreement resulted in a license for IBM.

4 But independent of the license, Your Honor, and
5 you'll recall I said I'd come back to this, there was a
6 warranty and a representation made in that strategic business
7 agreement that there was no infringing code of any third party
8 in the Linux kernel. That representation was made by Caldera,
9 by SCO's predecessor. It promised IBM, Your Honor, that there
10 was no supposed infringement in there, and it also promised to
11 hold IBM harmless and indemnify it against any third party
12 intellectual property claims.

13 Now, rather than make a public issue of this, Your
14 Honor, raises concerns, commence litigation, SCO undertook,
15 instead, following that effort to initiate and to participate
16 in and to champion the UnitedLinux effort. And Caldera and
17 SCO were not simply participants in the UnitedLinux effort,
18 Your Honor, they were champions of it. Ransom Love, the
19 former CEO, has been described as the champion of the project,
20 And Ralf Flaxa, a former Caldera employee, was described as
21 coordinating the creation of this united standardized version
22 of Linux. And again, everyone in aligned code is in their
23 UnitedLinux product.

24 Courts, Your Honor, have estopped parties from
25 asserting claims of discriminate based on showings far less

1 than that which is here. And respectfully, Your Honor, we
2 would submit that the Court should exercise its powers to
3 enter summary judgment in favor of IBM on grounds of estoppel.

4 That brings me to my next point, which is that SCO
5 cannot establish, Your Honor, that there is substantial
6 similarity between Linux and UNIX. There are two reasons here
7 why summary judgment should be entered in favor of IBM. The
8 first is that none of the supposedly infringed material, Your
9 Honor, there were 320 lines of UNIX code supposedly infringed
10 by these 326, and none of those 320 lines are protective by
11 copyright. The second point, Your Honor, is even if they
12 were, SCO couldn't just demonstrate that those lines of code
13 result in substantial similarity as between Linux and UNIX.

14 Now let me briefly just take each of those points,
15 Your Honor. As to protectability, in IBM's papers we laid out
16 a variety of reasons as to why these 320 lines are not
17 protected. And the law is pretty clear that the material is
18 not protectable by copyright if it's dictated by
19 externalities, if it's unoriginal or if it's mere merger
20 material. As we laid out in our papers, Your Honor, those 320
21 lines of code are dictated by externalities, they are
22 unoriginal and they are merger material.

23 And the notable point to make here, Your Honor,
24 with respect to externalities, IBM put forward evidence that
25 five separate externalities dictate that 320 lines of code.

1 SCO's experts failed to respond, Your Honor, in any meaningful
2 way to two of them. And we respectfully submit that for that
3 reason alone, those two externalities should be deemed
4 admitted as against SCO. That's programming practice and
5 industry standard.

6 As to originality, we likewise offer evidence that
7 the code at issue lacks the requisite originality. And SCO
8 disagrees with that, Your Honor, and has offered testimony of
9 their expert Mr. Cargill. But the methodology on which
10 Mr. Cargill relied to conclude that the material at issue is
11 original is, we respectfully believe, wrong as a matter of
12 law.

13 For example, Mr. Cargill stated, Your Honor, that
14 the choices used to list names in alphabetical order and to
15 assign numbers in a sequential order, evidences reference to
16 the creativity to satisfy his standard to determine whether
17 that matter is original within the meaning of the copyright
18 law. And that is wrong for the reasons set out in our papers
19 and the reasons set out in the Supreme Court decision in Feist
20 and in 10th Circuit decision in Mitel.

21 And looking, Your Honor, at the code issue here, I
22 would submit that there is no cognizable originality in this.
23 Calling in error occurs when a person seeks to access a file
24 for which they have no permission, EPERM, evinces no
25 originality, anymore than saying that the 10th Circuit Court

1 of Appeals should be referred to at 10 Cir reflects any
2 originality.

3 Finally, Your Honor, as to protectability, IBM put
4 forward evidence that the material at issue is merger
5 material. SCO failings to offer any meaningful response to
6 that, Your Honor. And again even if it had, even if that
7 which is offered by SCO's expert Mr. Cargill were sufficient
8 to create a fact question, and we do not believe it is, but
9 even if it were, Your Honor, that information is not
10 information that was properly disclosed by SCO as it was
11 required to be disclosed pursuant to Court's order.

12 And again, just looking at the material issue, Your
13 Honor, there are only so many ways to say that a computer
14 system is Linux, and it's this version, and it's that release.
15 And that's what some of the structured declarations do here,
16 Your Honor. There's only so many ways to put it, just like
17 there are only so many ways to organize the information in a
18 case name. Case, reporter, court and date.

19 Now, the second part of this, Your Honor, is that
20 even if this material was protectable, and we submit it's not,
21 SCO couldn't and we submit has not shown substantial
22 similarity. Substantial similarity is not all about quantity
23 to be sure. But quantity is an important nevertheless part of
24 that as reflected by the 11th Circuit's decision in the Mitel
25 case. And 320 lines, Your Honor, of the millions of lines of

1 code at issue here are not of significance.

2 And in any event, when you look to the qualitative
3 aspect of this code, there is no more significance to the
4 codes than there is when you look at it from a quantitative
5 perspective. We are not talking, Your Honor, about 320
6 contiguous lines of executable code. We are talking about a
7 scattered collection of code. None of the header files are
8 executable, Your Honor. They are simply interface that
9 provide information like if there's an error, let's call it
10 EPERM and assign a number 1 do it. And that we respectfully
11 submit is not protectable by copyright.

12 Finally, Your Honor, with respect to misuse, SCO
13 has misused the copyrights at issue, and as a result of that
14 misuse may not enforce them. SCO doesn't dispute that a
15 copyright may not be enforced, Your Honor, if it has been
16 misused. We think the facts here establish that. SCO claims
17 control of more than a million lines of code supposedly dumped
18 into Linux kernel. By contrast, there's 326 lines properly
19 described in its final disclosures. And among the lines of
20 code claimed by SCO as infringing, Your Honor, are files
21 plainly and indisputably owned by IBM, like JFS, files plainly
22 and indisputably owned by BSD and information which SCO's own
23 experts concede they have no claims of copyright infringement.

24 For those reasons, Your Honor, respectfully summary
25 judgment should be entered in favor of IBM. Thank you.

1 THE COURT: Thank you, Mr. Marriott.

2 Mr. Singer?

3 MR. SINGER: Your Honor if I might approach with
4 some materials for the Court.

5 THE COURT: Sure.

6 MR. SINGER: And for counsel, as well.

7 Your Honor, if it may please the Court, this is a
8 claim by one of the world's biggest enforcers of intellectual
9 properties rights, IBM, which publicly boasts of annually
10 earning over a billion dollars from enforcing its intellectual
11 property portfolio to seek to extend its fight with SCO by
12 seeking a judicial declaration that SCO conversely has no
13 rights.

14 Now, as we listen to IBM's position and read their
15 papers, it seems to be this. It seeks through its
16 counterclaim to enforce and determine first that SCO has no
17 copyrights, even though Mr. Marriott didn't want to argue that
18 point. Yet, that the copyrights it does not own were assigned
19 to a joint venture.

20 IBM seeks a declaration that UNIX copyrights don't
21 cover any protectable expression and that they're basically
22 worthless with respect to the issues as they relate to Linux.
23 While at the same time, they are so important that they led to
24 a series of no fewer than four licenses which were negotiated
25 and apparently IBM claims reliance on the use of this

1 material.

2 And finally, IBM says that despite having obtained
3 licenses, it could properly ignore the language and the
4 limitations in those agreements and just rely instead on the
5 fact that Caldera was involved in Linux activities, and so
6 therefore anything IBM wanted to do was okay.

7 We submit just to state that contradictory refusing
8 sets of arguments points out the fact that this is not
9 appropriate for summary judgment.

10 Well, let's take a look at what IBM's Tenth
11 Counterclaim really seeks. And I would ask Your Honor to turn
12 to the small book, which are a set of our exhibits to Tab 1.
13 And we ask, what does IBM's Tenth Counterclaim really seek?
14 And I think that leads to a comparison of what IBM said when
15 they filed their Tenth counterclaim back in 2004 and how they
16 characterize it now.

17 If you look at that Tenth Counterclaim,
18 Paragraph 171 particular, IBM said that it did not believe
19 that its activities relating to Linux, not talking
20 specifically about the Linux kernel, but it's activities
21 relating to Linux including any use, reproduction and
22 improvement of Linux do not infringe, induce infringement or
23 continue to infringement.

24 Now today IBM says, we're just seeking a
25 declaration from this Court that the Linux kernel, the core of

1 the operating system, does not infringe copyrights owned by
2 SCO. Why the difference? The difference is so that IBM can
3 stand up and seek to argue to the Court that only 326 lines of
4 code are at issue. By defining the Linux kernel so narrowly,
5 by relying on solution of items from our December disclosures,
6 from assuming that everything in our expert reports concerning
7 non-literal copying will be struck and upheld by this Court,
8 by assuming that technologies that involve interaction between
9 that kernel and the user space around it, such as STREAMS,
10 such as ELF are out of case, they define it as 326 lines.

11 THE COURT: Let me ask you a question about that.

12 Hypothetically, assume I don't reconsider my November 29th
13 order and hypothetically assume that I uphold Judge Wells'
14 November 30 order that was written on December 21st, what
15 affect does that have on this motion?

16 MR. SINGER: Your Honor, everything in this book is
17 still indicates --

18 THE COURT: This one.

19 MR. SINGER: The big book -- is still indicates
20 assuming both of those orders were sustained. The code which
21 is in this big book shows precisely with copying in red and
22 lines tied to the items still in the case indisputably not
23 struck by Judge Wells, the copy that occurred between Linux
24 and our protected expression. They are in red. There are
25 lines going from the left-hand to the right-hand side of the

1 page. They are divided into four categories, and there are
2 thousands and thousands of lines.

3 We have put them in parallel in various places in
4 the book, smaller book, but this shows why IBM is seeking to
5 narrow the declaration it seeks from the Linux activities in
6 general and its support of Linux and its copying of Linux
7 because these things go along with Linux. Linux doesn't work
8 without STREAMS. It doesn't work without ELF. It won't work
9 without these header files.

10 By seeking to redefine their request for
11 declaratory relief they're able to say only 326 lines are at
12 issue, when in reality everything in this book, even assuming
13 every order by Judge Wells is upheld, everything in this book
14 is still in the case and it is still subject to this claim.

15 And we would submit it is meaningless, and I don't
16 know why IBM would seek a declaration only on 326 lines when
17 it doesn't eliminate the fear and uncertainty and doubt they
18 talk about with respect to all the things around the kernel
19 that is protected copyright and expression.

20 Your Honor, with respect to the burden of proof,
21 this is IBM's action for declaratory judgment. And under
22 10th Circuit law, IBM has the burden of proof. If one turns
23 to Tab 2, you see the Wuv's case, which is a District of
24 Colorado district court decision, citing 10th Circuit case in
25 Steiner Sales making it plain in this circuit, the plaintiff

1 in declaratory action carries the burden of proving its
2 claims.

3 And you'll notice in the book which you received
4 from IBM, they cite cases in the District of Maryland, the
5 Northern District of California and the Eastern District of
6 Pennsylvania, none, of course, which is in the 10th Circuit.

7 Now, I'd like to turn to the issue that
8 Mr. Marriott did not address. I won't spend a lot of time on
9 it, but they put a lot of time in their briefs on it, you've
10 heard it about every opportunity, and it's a central issue in
11 this case, and that's the issue of who owns the UNIX
12 copyrights.

13 It is our contention, Your Honor, that the
14 documents make clear that those were transferred as part of
15 the sales of UNIX business from Novell to Santa Cruz in what
16 we know as the asset purchase agreement. The agreement as
17 Your Honor has heard clearly indicated the intent was to
18 transfer that entire business. There was an assets schedule
19 of assets to be transferred, which specifically said that all
20 rights and ownership of UNIX and UnixWare including all
21 versions, all technical installation, the source code, the
22 documentation, all of sellers' rights under software
23 development contracts, all those contracts, all of that is
24 transferred.

25 The only reason we submit there could be any

1 question at all was because of the way in which an item in the
2 excluded assets schedule was originally worded. It was worded
3 in Item 5A of that schedule as excluding the copyrights, all
4 copyrights and trademarks. That was in error. It didn't make
5 any sense that you transfer the entire business of UNIX, you
6 exclude the copyrights. And that was clarified in Amendment
7 Number 2, which made clear that what Novell retained were
8 copyrights and trademarks except for the copyrights and
9 trademarks owned by Novell as of the date of the agreement
10 required for SCO to exercise its rights with respect to the
11 acquisition of UNIX and UnixWare technologies.

12 And I submit, Your Honor, it cannot be any real
13 question you need the UNIX and UnixWare copyrights to run a
14 UNIX and UnixWare business, the right to extend intellectual
15 property to others, to enforce those intellectual property
16 rights against infringements.

17 This amendment clarified what was transferred as of
18 the time of the closing because then with this amendment
19 there's no confusion as to what is covered on the schedule of
20 transferred assets. It's all right, title and interest.

21 Now, we don't even think it's necessary to look to
22 extrinsic evidence, and, of course, Mr. Marriott doesn't want
23 to argue any of this. And I have to say I probably wouldn't
24 want to argue a motion where witnesses on both sides agree
25 that it was the intent to transfer the copyrights to

1 Santa Cruz.

2 And this is set forth in our book. It is included
3 in summary form at Tab 11, and behind that, more lengthier
4 quotes from each of these witness who have testified under
5 oath both from Novell, the lead Novell negotiator, the senior
6 business executive, the senior engineer as well as Santa Cruz
7 that the copyrights were intended to be transferred.

8 Now, there are other extrinsic evidence of conduct
9 set forth in our book that support that. There is simply no
10 question we think here that there was a valid transfer, and
11 those rights are owned by SCO. And, of course, it is the
12 Novell trial the Court has set that will determine the
13 ownership of those copyrights to the extent that Novell
14 continues to assert that they did not transfer them despite
15 the expressed intent of parties on both sides of that
16 transaction.

17 Now, IBM contends that these copyrights that we did
18 not own we nevertheless managed to assign to a joint venture
19 called UnitedLinux. And before turning to the merits of that
20 contention, I'd like to say a few words about the unusual
21 strategic posture of it. Novell, as the Court will recall,
22 moved last year to stay parts of the case involving Novell
23 because their wholly-owned subsidiary SuSe Linux had initiated
24 an arbitration in Europe against SCO where this issue is
25 precisely what is to be determined under the arbitration.

1 What were the rights under the UnitedLinux agreement?

2 Now IBM with whom Novell has a joint offense
3 agreement concerning these two cases comes in here and says,
4 Judge, you should decide those issues as a matter of summary
5 judgment in this case.

6 We don't think that is appropriate. And we think
7 that if this is an issue which is going to be decided and the
8 Court is going to look to it, decide it in a forum where
9 parties directly involved are going to resolve these
10 differences, as Novell urged this Court last year, and the
11 Court agreed upon.

12 Now, it is clear that this is not a matter of
13 summary judgment, and we think it is equally clear that the
14 UnitedLinux agreement did not give up our intellectual
15 property rights.

16 Your Honor, if you turn to Tab 15 we see that the
17 key assignment of intellectual property rights was the
18 intellectual property to be development pursuant to the JDC.
19 You form a joint venture, and you say that we assign the
20 rights which are going to come out of the work done by the
21 joint venture. There was not an intention by participating in
22 that to give up rights either to UNIX or to anything that
23 might be sitting around in Linux as it went into that joint
24 venture.

25 The term software is defined as implementation of

1 the Linux system to be developed through the joint venture.
2 There is evidence in the record that the copyright in UNIX
3 material was not developed pursuant to the joint venture.
4 And, in fact, as a factual matter, during the joint venture,
5 SCO was asked to contribute UNIX technology, and SCO refused.
6 And that's Mr. Nagle's declaration, which is SCO's
7 Exhibit 233.

8 Now, the preexisting material which Mr. Marriott
9 refers to, which is listed on Exhibit C, and we have a copy of
10 that behind our arguments slide at Tab 16, that is the only
11 material which UnitedLinux of existing material from Caldera
12 was authorized to use. And it did not include the System V
13 UNIX code. Mr. Nagle says that in his declaration. Even
14 Mr. Love, who is a witness for IBM, agrees with that. And
15 therefore, it is not part of what either expressly in
16 Exhibit C UnitedLinux had a right to use, nor is the issue
17 here over material that was created in a joint venture.

18 Now, Your Honor, this is not the exact sequence in
19 which Mr. Marriott dealt with these points, but I'd like to
20 turn to the next issue, which is the question of whether we
21 have put forth enough evidence to defeat summary judgment on
22 the issue of infringement, that IBM by distributing and
23 copying and inducing others to distribute and copy Linux have
24 infringed our copyrights.

25 The very first argument that IBM makes in Tab 18 of

1 our binder relates to this, is that we cannot prove
2 unauthorized copying. We didn't have a line, I suppose, in
3 the December disclosures that says, IBM infringes our
4 copyrights by copying and reproducing Linux. Now, that's what
5 they say in their brief, and that's what they say in their
6 papers. But listen to what IBM's counsel said to Your Honor
7 two years ago, more than two years ago in September of 2004
8 when they were resisting discovery to the issue of their Linux
9 activities. They said, quote:

10 It is not disputed that we copied Linux and we
11 encouraged others to copy Linux. That's not in
12 dispute. We admit that we copied. No discovery
13 with respect to IBM's Linux activities is
14 required.

15 And, of course, the record has Mr. Frye from IBM
16 admitting the same thing. That constitutes infringement. And
17 as the cases we set forth on the very next page at Tab 18
18 indicate, if Linux infringes UNIX, their activity in copying
19 Linux is infringement. If Linux infringes our UNIX
20 copyrights, their encouragement of third party copying and
21 reproduction also infringement. So there's no issue here.

22 Now, the question is whether Linux is copied from
23 UNIX in a way that violates our protectable rights. And that
24 is inherently a factual matter for fact evidence and expert
25 testimony. The 10th Circuit recognized that. We reproduced

1 this at Tab 19 when they said:

2 Whether the defendant copied portions

3 of the plaintiff's program is a factual matter.

4 And it's the Gates Rubber case.

5 There are a lot of facts that indicate this. I

6 mean, if one goes just to IBM's own documentary admissions, a

7 couple of which we've put on this blow-up of Exhibit 276 where

8 IBM internally says, Linux is derived from UNIX. UNIX was a

9 pre-write of Linux. It is proved by this book, Your Honor,

10 that these thousands of similarities did not occur by

11 coincidence. This was copying and certainly at a minimum is a

12 factual matter.

13 We have put in both in that book and here in four

14 areas, system calls, ELF-related materials, STREAMS-related

15 material and memory allocation material where there is no

16 question, even under Judge Wells' order that those are

17 indicates and we have appropriate claims.

18 Now, we do not agree with Judge Wells' order which

19 limited our copyright case in that matter. At Tab 26, we

20 point out the fact that in addition to copying literal code,

21 code in that book, there was a copying of the non-literal

22 protectable elements. The structure, the algorithms of UNIX.

23 That didn't mean we contend to be in the December disclosures

24 as specific material misused. If we had said they copied the

25 Linux structure, IBM would move to strike it on the grounds

1 that we didn't cite line, version and code.

2 It is indisputably within the May 2005 expert
3 report set forth which IBM ignores in its motion and IBM's
4 motion is predicated on us not having any rights to talk about
5 non-literal copying. Non-literal copying is recognized by the
6 10th Circuit in Gates and by every other case as a relevant
7 inquiry where experts have to go through an abstraction
8 process and determine what are the protectable elements, go
9 through that and filter it of unprotectable material and then
10 compare it.

11 IBM experts in IBM's motion have done none of that
12 with respect to the non-literal issues. Just this chart which
13 we produced shows the structure of a system calls between
14 Linux 2.4 and UNIX System V Release 4 their similarity. That
15 structure we contend is protected. We contend that the
16 structure just as the STREAMS module, which is put forth at
17 Tab 26, as well, is protected. Those should be issues in this
18 case, Your Honor. Those are the issues we contend in this
19 case.

20 Your Honor, I would like to say a few words about
21 whether this is protectable expression. The Gates Rubber case
22 was applied by our expert Tom Cargill. At Tab 28, we have an
23 excerpt of Mr. Cargill's report, which recites the applicable
24 10th Circuit law, explains how he applied it going through
25 these three steps. He specifically looked at whether or not

1 the expression being used was dictated by external standards
2 which includes the filtration issue that Mr. Marriott talks
3 about. It was his opinion that there was infringement.

4 You know, IBM knew we were going to rely on
5 Mr. Cargill. They wait until their reply brief on this motion
6 to take shots at Mr. Cargill saying he's not admissible, that
7 he isn't using the right legal standard, and et cetera. If
8 they continue to make that argument seriously and the way to
9 do it and the time to do it we submit is a motion in limine or
10 Daubert motion later in the case. If it is not on grounds
11 coming out of a reply brief to all of a sudden saying to the
12 Court without even giving any response to IBM should determine
13 that Professor Cargill did not apply the right standard, and
14 that when he says this is protectable expression, he somehow
15 applied that test wrongly.

16 I'm not going to go through each of the tabs where
17 we deal with the issue of whether this is Scenes a Faire
18 material, whether or not there was enough originality in the
19 expression to be protectable and whether it merged with
20 abstract ideas. On each of those points, Mr. Cargill gives
21 examples, and he indicates his opinion.

22 It is clear that you have a strong amount of
23 protectable expression in software code, and we include, in
24 fact, in these papers excerpts from an amicus brief that IBM
25 filed in the Gates Rubber case saying as much, which we think

1 was consistent with Gates Rubber. It said that source code is
2 generally protectable.

3 If one turns to Tab 33, Dr. Cargill's report is
4 quoted there where he gives an example. First he says
5 generally there are numerous ways to express the ideas
6 embodied in the copied material. This is second page of
7 Tab 33. And numerous ways to write code that performs the
8 same task of copied material.

9 He gives an example of a fork being a system call,
10 which could refer to a diverging path. It relays a certain
11 creativity on behalf of the programmers. The system called
12 nice is another example.

13 If you turn to the next page you see IBM's amicus
14 brief being quoted as well as Gates Rubber decision. In that
15 brief, IBM said it is not appropriate to conclude that a
16 program's function -- which is really what Mr. Marriott spent
17 a lot of time talking to you about, the function of a program.
18 It is not appropriate to conclude that a program's function
19 and its expression of that function are the same.

20 At bottom, Your Honor, these issues will have to be
21 decided at trial including the issue of substantial
22 similarity. You know, it's interesting that even if only
23 326 lines of code were at issue, it would still be a factual
24 issue requiring trial on it.

25 If Your Honor turns to Tab 35.

1 We have at that tab the Dun & Bradstreet case from
2 the Third Circuit, 27 lines copied out of 525,000 were held
3 they could be substantial.

4 The US Supreme Court on the next page in the Harper
5 & Row case said that 300 to 400 words cannot be deemed
6 insubstantial. And they reversed the Second Circuit in that
7 case for so holding.

8 The Dun and Bradstreet case on the next page is
9 cited to point out that the real importance is determined
10 qualitatively, not quantitatively. And that the information,
11 while it was only a few lines far less than what we're talking
12 about in this book, was highly critical. And there's no
13 dispute on this record that if you took out of Linux the lines
14 at issue, even just those 326 lines, let alone ELF and STREAMS
15 and everything else that is at issue here Linux simply would
16 not work.

17 At bottom, as the 10th Circuit said in Gates, the
18 issue of substantial similarity is a classic jury question.
19 It's not appropriate for summary judgment.

20 Your Honor, I would next like to turn to the issue
21 of a license. And I'd like to begin by observing the
22 interesting posture in which the issue of a license comes
23 before the Court, because IBM's position today is that this
24 case could be resolved simply by looking at the SBA, which IBM
25 obviously was aware of as a party to it in 2003, or the GPL

1 public license, which Caldera they claim gave up its rights
2 in.

3 And if that is true, Your Honor, where has IBM been
4 with that argument since March of 2003 when this case was
5 filed? If this case could have been resolved with respect to
6 these issues simply by coming in here with a copy of the
7 general public license or the SBA, why didn't they do that
8 back in 2003? If that is true, why didn't they do it in 2004
9 when they made a summary judgment motion to you on this
10 precise counterclaim and never raised either of those issues?

11 We submit the reason is because these licenses do
12 not give IBM the rights that today they are asking you to find
13 as a matter of law.

14 Now, I'd like to say a few words about the SBA
15 license, the first that Mr. Marriott relies upon. Tab 37 in
16 our binder and a couple tabs after that we discuss this
17 agreement. This is an agreement when the Court reviews it is
18 clear it is an agreement to allow distribution of certain
19 products that are then specified in an Exhibit A to a standard
20 of work. And that standard of work makes it clear that IBM is
21 simply a conduit to end users for the distribution of certain
22 Caldera products and is not being given any intellectual
23 property rights to UNIX software, let alone to give away that
24 UNIX software to others.

25 If one turns to the next page behind Tab 37, we

1 quote Section 8.3. Your Honor has been directed to part of
2 Section 8.3 when IBM spoke. It was their Tab 26. You could
3 compare Tab 26 which reproduces in part Section 8.3 as opposed
4 to the entire section which in red it includes the material
5 they do not quote. And that material makes clear that:

6 The providing party, which was the Caldera,
7 Inc., will not include any preexisting materials
8 in any deliverable unless they are listed in the
9 relevant standard of work.

10 And when you turn to the standard of work here,
11 nothing is listed here which gives them the right to
12 distribute, to modify UNIX intellectual property or gives them
13 rights to open source that through Linux or anything else.
14 That document which, is IBM 467 says:

15 IBM and its authorized agents shall be a
16 conduit through which Caldera sells, offers to sell
17 packaged license work and preload license work.

18 And the only thing they're authorized to do is to
19 preload, install and reproduce the preload license work on two
20 particular platforms which are identified in this scope of
21 work, and the master copies are to be used solely for purposes
22 consistent with this standard of work. That is Section 3.0.

23 So at bottom, what this means is if SCO was coming
24 in here and suing IBM for distributing Caldera products that
25 were distributed under this standard of work, they would have

1 an offense. They could distribute that. But what this is not
2 in any form of intellectual property license, any release of
3 our rights, anything which gives them or anyone else the right
4 to take UNIX intellectual property and distribute it to the
5 world.

6 Your Honor, the other license, the GPL license,
7 also fully known from 2003, never raised then, never raised in
8 2004. Today they suggest that all of IBM's Linux activity is
9 insulated under the GPL. The GPL, we submit, requires a
10 copyright holder to make a knowing, voluntary express
11 surrender of its copyright rights to its software and then to
12 effectuate that decision with a particular notice spelled out
13 in the general public license, which did not happen here.

14 We have that at Tab 38. Section 0. And
15 Mr. Normand in the argument that deals with the GPL which Your
16 Honor will hear right after this will have more to say about
17 this, but I'd like to say a few things about the GPL.
18 Section 0 says that:

19 The GPL only applies to work if it bears
20 a notice placed by the copyright holder saying
21 that it may be distributed under the terms of the GPL.

22 SCO has never placed any language on either
23 UnitedLinux product or SCO Linux Server 4.0 indicating that it
24 was granting any license or rights under GPL or any open
25 source license.

1 That's both in the record factually through
2 Mr. Nagle. And while IBM makes generalized assertions that we
3 distributed under the GPL, what, in fact, the record shows is
4 you have products from three divisions. Two of them were
5 Linux from UnitedLinux that were just passed off. Whatever
6 license they came with came from them. And then there was a
7 disk of proprietary material. There was no SCO license under
8 the GPL Section 0 that was required. And, in fact, you will
9 see during Mr. Normand's argument that IBM knows how that
10 license looks for their material that they decided in
11 knowingly and willingly to distribute under open source, you
12 have that copyright authorization notice required under 0.
13 It's set forth in the GPL how to do it. We reproduced those
14 directions under Tab 38. And we've also put in IBM's copy of
15 that.

16 Now, in addition, there is no question, and we put
17 this forth at Tab 39, that Linux has no copyright attribution
18 to SCO or to Santa Cruz in the materials distributed under the
19 GPL. That in itself takes it outside that protection.

20 And I would note in connection with this that even
21 Ransom Love admits that UNIX was not an open source by
22 Caldera. Now, Mr. Love is someone who IBM submitted a
23 declaration from and we submitted a declaration from. We
24 disagree strongly with a lot of things Mr. Love said in that
25 declaration. We also pointed out to the Court what Mr. Love

1 did not disclose, and that is he's a paid IBM consultant.

2 But even Mr. Love in his declaration, and I have
3 this excerpted at the last page on Tab 39, even Mr. Love
4 acknowledged that while Caldera thought about open sourcing
5 UNIX assets, it never did know. And it certainly didn't do so
6 under the GPL. And I submit this is why for the last three
7 years of this litigation IBM hasn't run into court and say,
8 GPL resolved these issues.

9 Your Honor, I would also not go into the details of
10 the Spec 1170 license that they argue in their brief, other
11 than to say it was not established it even covers the material
12 here and was only in the material that create -- of license
13 that created specification, not a license to use that in a
14 commercial product that would compete with UNIX.

15 In addition, there is the TIS issue which is raised
16 in their briefs which Mr. Marriott left to the briefs. I just
17 want to point out that with respect to that which relates to
18 the ELF, even Mr. Harold, who is an IBM employee, recognized
19 and did not have the authority to that ELF code on the basis
20 of that license. And that appears at Tab 43 where Mr. Harold
21 in 1999 indicated that SCO was the only source supplier, that
22 they wanted to deal with it for Linux, but they couldn't
23 because of SCO's copyrights.

24 And, in fact, in addition, Mr. Cargill, and this is
25 excerpted at Tab 44, shows that the Linux programmers went

1 beyond using what was ever in this specification. They went
2 so far as to copy the actual code from the System V Release 4,
3 and that wasn't authorized no matter how long it looks at the
4 TIS license.

5 Your Honor, next I'd like to turn to the equitable
6 defenses which IBM asserts are a basis for summary judgment
7 and declaratory relief. I submit to you that IBM is probably
8 the last party rather than the first party that should come
9 into this Court and seek a determination of equitable estoppel
10 which depends on the concealment of true facts from their
11 knowledge and their blind reliance on false facts that SCO or
12 Caldera or others are supposedly making or implying to them by
13 their actions as to which they have no awareness of the
14 truths. Perhaps equitable estoppel is an argument that a user
15 out on the street might make, but to suggest that IBM of all
16 parties doesn't have an awareness of this truth.

17 And the premise of this argument has to be we own
18 the copyrights, that there is protectable expression in those
19 copyrights that has been copied in the Linux, that they are
20 infringing, that they don't have an express license, but
21 nonetheless, they should have been allowed to do whatever they
22 would and be immune from liability because they were watching
23 Caldera and SCO distribute Linux.

24 And we submit that that totally perverts the idea
25 of equitable estoppel and doesn't come close to the standard

1 required by law. And I note that IBM did not even mention
2 equitable estoppel in its Tenth counterclaim. You can read
3 that Tenth counterclaim. Didn't talk about it. It also
4 wasn't raised in a motion for summary judgment that was raised
5 before Your Honor back in May of 2004.

6 And I submit that the reasons are why equitable
7 estoppel is seldom appropriate. At Tab 45, the Court is aware
8 I think that equitable estoppel presents issues of facts and
9 is one only a fact finder can draw. We believe that that's
10 clear from those authorities, as well as the Deseret case.
11 Under New York law, we turn to the last tab there, estoppel,
12 we think this is true, generally under the common law requires
13 concealment of material facts, the lack of knowledge by the
14 party claiming estoppel, none of which IBM has come close to
15 establish.

16 Moreover, and this is a point in our briefs, and
17 it's the last point we have at Tab 45, equitable estoppel
18 can't justify a broad declaration that our rights are
19 unenforceable or that what other people have done is okay. It
20 is a personal defense. And I think there's probably maybe one
21 or two exceptions in patent cases where courts have rendered
22 declaratory judgments based on equitable estoppel. But
23 essentially that's an offense to be viewed in light of actions
24 alleged of infringement at the time.

25 Now, that's the law. The facts here are such that

1 IBM is just jumbling together in their submission actions
2 taken by Caldera, actions taken by SCO and leaving out an
3 important issue, which is who owned the copyrights in question
4 at what time?

5 This is a chart -- Your Honor will recall this
6 chart from last week, because it is the same equitable
7 estoppel argument. The copyrights are owned by Santa Cruz all
8 during this period of time. Santa Cruz is not in the Linux
9 business. They argue, well, there is a few people who
10 attended an X/OPEN conference. Those people did so as
11 individuals. Each of those sets forth in their submission of
12 facts is disputed in our response.

13 Santa Cruz which owned the copyrights was not in
14 the Linux business during the time of 2001 when IBM decided to
15 embrace Linux, to form the Linux technology center, to
16 encourage others to use Linux, to copy Linux, to contribute
17 technology to Linux, that could not possibly then be based on
18 reliance of any action by the copyright owner.

19 What Caldera, a company that did own the copyrights
20 during this time, was doing with respect to Linux cannot be
21 any more of a basis for IBM to suggest that the copyright
22 owner doesn't care. But if I distributed Linux or you
23 distributed Linux and IBM said they saw us distributing Linux
24 so it must have been okay,

25 With respect to actions taken after the copyrights

1 that were transferred in 2001 to SCO, the evidence is clear
2 that at that time several things happened. First of all, the
3 business of SCO because of Linux being out there changed
4 dramatically. The UNIX products went south, and you saw that
5 chart back in the contract argument last week. At Tab 49, we
6 point out case law to indicate that even if you had nothing
7 more here a plaintiff's decision not to sue until infringement
8 action become a competitive threat cannot give rise to an
9 equitable estoppel defense.

10 Suit was brought in 2003. IBM points to the facts
11 that, well, you still had code on the servers that might have
12 been downloaded after we filed suit. But how could anyone
13 rely on the fact that you could download code from a SCO
14 server? They tried to discontinue their business without
15 jeopardizing the customer relationships. But the relevant
16 point for estoppel is IBM can't rely on any action after we
17 actually sued them to suggest we're not enforcing our rights.

18 Now, if this was all there was, it would be enough
19 for a factual issue with respect to estoppel. But there's a
20 lot more. In addition to these facts is what IBM was doing.
21 Santa Cruz saw IBM engaging in some Linux activities here
22 during the time they were engaged in the joint venture called
23 Project Monterey Your Honor heard all about on Monday. And
24 they were concerned about this, and they asked IBM.

25 And what did IBM say? That's at Tab 47.

1 Mr. Michels, who is the Santa Cruz CEO, said that he and
2 others at Santa Cruz informed IBM that they were concerned
3 about IBM's announced support for Linux and how that might
4 impact Project Monterey. And IBM's response was to emphasize
5 that Linux was not being supported by IBM as a commercially
6 hardened operating system and would not encroach on
7 Santa Cruz' core markets or the markets targeted by Monterey,
8 and that we need not worry about it.

9 This alone creates a sufficient factual issue where
10 a jury can determine whether SCO and Santa Cruz and then later
11 SCO had a right to rely on what IBM expressly told them when
12 they raised the issue with IBM. Of course it turns out that
13 IBM was working as fast as it could to bolster Linux' activity
14 and ability to target the markets in which SCO contended.

15 Furthermore, estoppel requires reasonable reliance
16 by the people at IBM making these decisions, and they have not
17 said that they relied on SCO. And you will see no document in
18 any of the files that is contemporaneous with the events in
19 question where someone at IBM wrote and said, I think we can
20 go ahead because Caldera is distributing Linux or because
21 someone from Santa Cruz attends a conference and we are okay.
22 You won't see that.

23 We asked Mr. Frye who is the head of the Linux
24 technology center at his deposition about these issues, and
25 his answers appear at Tab 48. He says he recalls no

1 conversations about SCO or any conversations about the rights
2 that SCO and its predecessors held regarding Linux. There
3 were no discussions within IBM about whether IBM's technical
4 contributions would violate any third party rights. No
5 conversations with Wladawsky-Berger, who was a person even on
6 top of Mr. Frye.

7 So there's not any decision here either in
8 documents or otherwise which says, we've looked at these sales
9 and we know what we can do because of that. That is simply a
10 position in this litigation. In fact, Mr. Harold's statement
11 also is inconsistent with that.

12 They refer during argument to Mr. Love saying that
13 we were prepared to give up rights. If you turn to the last
14 slide in Tab 48, we point out first of all that what Mr. Love
15 is being relied upon by IBM is actually disputed by Mr. Love's
16 declaration for SCO. And remember, this is an IBM paid
17 consultant. And he later said that Caldera team did not
18 investigate the issue of whether intellectual property rights
19 existed or it had been disclosures that violated those rights.

20 There are five other members of the Caldera board
21 and senior management who dispute that the company ever made a
22 decision that it didn't care about enforcing its intellectual
23 property rights. If IBM wants to raise that type of estoppel
24 issue at trial, they can do so, but there is certainly a
25 serious factual issue concerning that.

1 Now, the last point which was raised by
2 Mr. Marriott was copyright misuse, which in essence is
3 dependant upon a lot of other arguments. We submit that like
4 other equitable offenses is inherently factual nature and
5 depends on the resolution of those issues.

6 SCO -- I'll just mention the one example
7 Mr. Marriott mentioned. He said that it proves misuse by us
8 invoking JFS as an example of material viewer asserting
9 protection. As the Court knows from last week, there is a
10 serious factual issue about JFS. Our experts contend that JFS
11 was deprived from System V. In any event, it was part of the
12 derivative system AIX on which there were proprietary rights.

13 There is no basis, certainly not as a summary
14 judgment on a declaratory judgment to say that we are guilty
15 of copyright misuse. What we're guilty of, Your Honor, is
16 trying to enforce our intellectual property.

17 THE COURT: Thank you, Mr. Singer.

18 Mr. Marriott?

19 MR. MARRIOTT: Thank you, Your Honor.

20 THE COURT: Mr. Singer disagrees with you about the
21 burden of proof.

22 MR. MARRIOTT: He does, Your Honor. Let me address
23 that, if I may, briefly.

24 If you would look, please, at Tab 9 of our book.

25 You'll see there laid out cases which make clear who bears the

1 burden of proof.

2 And Mr. Singer refers the Court to the Steiner case
3 from the 10th Circuit, which is a decision from 1938, and the
4 Wuv's International case from the District of Colorado, which
5 is a decision from 1980. And if you look carefully at both of
6 those cases, Your Honor, you'll see what the plaintiff was
7 seeking in those cases was an affirmative declaration, not a
8 declaration of non-infringement. And if you look at the more
9 recent cases and the cases that address the precise question
10 here, which is who bears the burden in an action seeking
11 declaration of non-infringement, you will see that the
12 overwhelming authority supports IBM's position in that regard.

13 Now, Your Honor, Mr. Singer said a number of
14 things. Let me take some of his preparatory remarks first
15 and then come to his arguments about our specific arguments.

16 He said, Your Honor, at the outset that there was,
17 suggested at least, that there was some sort of gainsmanship
18 here that IBM had brought its claim seeking a declaration of
19 infringement, seeking a claim as to anything and everything
20 related to Linux, and then suddenly now years later has
21 figured out that that wasn't such a good idea, and we should
22 narrow the claim.

23 THE COURT: Narrow it to the kernel.

24 MR. MARRIOTT: Narrow it to the kernel. As if the
25 kernel, Your Honor, isn't as Mr. Singer well knows what people

1 refer to when they talk generally about Linux. And I will
2 refer Your Honor, if I may, to IBM's reply papers. In its
3 motion for summary judgment more than two years ago just after
4 we filed with the Court's permission in our motion -- our
5 claim seeking declaration of non-infringement, we were clear,
6 Your Honor, from the outset, Your Honor, and I refer you to
7 Footnote 3 of our reply brief, August 23rd, 2004, where we
8 said, quote:

9 Linux is susceptible to multiple meanings and
10 can be used in different ways. For purposes of
11 its Tenth counterclaim in this motion, IBM uses
12 the term in its generally understood sense to
13 refer to the core Linux code that is available at
14 <http://www.linux.org> and is commonly known as the
15 Linux kernel.

16 That was long before SCO finally disclosed in its
17 final disclosures what supposedly is at issue in this case.
18 The suggestion that we waited around to figure out what was
19 going to be identified and then gerrymander the case and
20 claims to fit it, Your Honor, is simply unsupported.

21 Mr. Singer complains that I didn't address in my
22 argument a number of allegations of infringement, if I may,
23 which he refers to in his tables including a particular, this
24 one, Linux copies the overall structure of UNIX, Your Honor,
25 that allegation of misconduct was not disclosed as it was

1 required to be disclosed in SCO's final disclosures. And
2 Magistrate Judge Wells ruled that SCO shouldn't be allowed to
3 proceed as to it. It is in effect not in the case. So, yes,
4 it's true, I didn't address it in my opening argument.

5 THE COURT: What's the reach of your argument
6 there? Are you saying there are basically claims relating to
7 any non-literal copying or not in the case?

8 MR. MARRIOTT: Your Honor, what I'm saying that
9 what SCO identified with specificity in its final disclosures
10 is in the case as it relates to this Tenth Counterclaim. And
11 on that issue and the Linux kernel, there were 326 lines of
12 code.

13 Now, contrary to what Mr. Singer suggests, and this
14 goes to the first of my original points, Your Honor, IBM does
15 not now know and SCO has never disclosed precisely what it is
16 that IBM is supposed to have done. As I said in my first
17 point, Your Honor, SCO can prove that IBM copied protectable
18 materials covered by their supposed copyrights. And
19 Mr. Singer says in response to that, well, IBM knows full well
20 that it copies Linux. And he points to statements, I suspect
21 my statements, Your Honor, sometime ago saying that IBM copies
22 them. Of course IBM copies them. That's not the point.

23 When you say that SCO has not disclosed as the
24 Court required it to do how it is that IBM is supposed to
25 infringed. That's what put IBM frankly in the impossible

1 position of being unable to properly prepare a defense because
2 we weren't aware of what SCO contends.

3 And if I can take an example, Your Honor, I pointed
4 the Court to the first line of code in the first file
5 identified, the EPERM-1 file. SCO has never said what it is
6 about that, Your Honor, that supposedly represents
7 infringement. Is it that the computer sends out an error when
8 someone tries to access a file to which they don't have
9 permission? Is it that there's a number associated with the
10 error? Is it the name EPERM? If the name had been in Linux
11 used has no permission, would that present the problem? Is it
12 the association of the name and number together? What if it
13 were no permission 6 instead of EPERM-1?

14 Nowhere, Your Honor, despite the Court's orders did
15 SCO ever disclose as the request in the orders made perfectly
16 clear it was required to do how it is IBM is supposed to
17 infringe? That's what was required for the final disclosures,
18 not just a bunch of lines of code, if I may, the big book that
19 was handed up, Your Honor, which by the way includes the same
20 code again and again and again.

21 There were 326 lines of code which are identified,
22 contrary to whatever impression this book intends to give.
23 326 lines of code were in the kernel. And while there was, in
24 fact, a red line drawn suggesting that those lines of code
25 were apparently similar to those, not a single piece of

1 additional information was given as to what it is that
2 supposedly represented infringement, what it was about that
3 that supposedly represented actual infringement.

4 The orders weren't complied with. IBM as a result
5 was not in a position properly to prepare a defense, and that
6 alone is basis for summary judgment.

7 Now, Your Honor, Mr. Singer refers to the licenses.
8 And he says there's no merit to the argument about licenses.
9 If there were any merits, says Mr. Singer, IBM would have
10 raised this questions two years ago.

11 THE COURT: That's what he said.

12 MR. MARRIOTT: What's the explanation for that,
13 says Mr. Singer.

14 Your Honor, the explanation for that is we spent
15 the last four years horsing around trying to figure out
16 exactly what it was that supposedly IBM did. And it wasn't
17 until we got the final disclosures after who knows how many
18 motions to compel that we were able to say, this is what's in
19 the case. And we can figure out that, in fact, they
20 distributed that code under the GPL, or it was in the
21 UnitedLinux agreements. And then we can figure out, Your
22 Honor, that we, in fact, had those licenses. And until SCO
23 told us what was at issue in the case, it was a little
24 difficult to make an argument to the Court that it was covered
25 by License A or B or C or any of the other licenses that, in

1 fact, covered this exact code.

2 Now, Your Honor, Mr. Singer suggests with respect
3 to the UnitedLinux agreements that it's untoward for IBM to be
4 making arguments of this sort here when that issue is
5 presented in the Novell matter. Well, Your Honor, the
6 arbitration agreement -- first of all, the argument is a new
7 argument today. It's not an argument that was raised in the
8 briefs. And even if it had been raised in the briefs, Your
9 Honor, the arbitration agreement that applied apparently as
10 between SCO and Novell is not an agreement by which IBM is
11 bound, and SCO is in no position to invoke or seek refuge
12 behind that agreement when if it had wished to make an issue
13 of the ownership of the code at issue, it could have done that
14 four years ago when it brought a case predicated on the
15 proposition that they owned the supposedly infringed code.

16 Now, Your Honor, with respect to the SBA license.

17 If I may ask Jefferson Bell to put up another board.
18 Mr. Singer suggests that IBM was merely a conduit for Caldera.
19 And as a result of being a mere conduit for Caldera, it didn't
20 really get a license of any consequence.

21 Well, Your Honor, it may well be that IBM was a
22 conduit for Caldera. But the license that IBM got in
23 connection with the strategic business agreement was in no way
24 limited by some motion being a conduit. The language which I
25 read to the Court which I won't repeat now could not be more

1 broad. A worldwide perpetual license to use the material in
2 the product identified.

3 And if Your Honor follows the schedule down, these
4 are the defined terms in it, and I'm not going to repeat them,
5 but IBM's license is in the deliverable. And all you have to
6 do is follow that right down, Your Honor, to the SCO Linux 4
7 product. And in that product, Caldera gave IBM a license to
8 do exactly what IBM supposedly is now doing improperly with
9 the code, the theory to which has never been disclosed.

10 Now, Your Honor, with respect to the GPL. The
11 suggestion has been made in a classic name game that somehow
12 the code which they distributed for more than -- well, I want
13 to say more than a decade, Your Honor, for nearly a decade,
14 the code that they distributed under the terms of the GPL was
15 shipped with copyright notice on.

16 Now, they come in here today and say, Your Honor,
17 you know, what's the big deal here? That's UNIX code. It's
18 only Linux code that goes into -- it's the same code, Your
19 Honor. They say it's the same code. All they've done is
20 change the name and say, you know, it's the same code, they
21 allege. And again, we don't in any way concede that it is.
22 But they say it's the same code, and just they called it a
23 different name and pretend as if the representations and the
24 promises that were made by them in distributing that code for
25 profit for a very long time are without consequence. And

1 that, Your Honor, respectfully is contrary to in more respects
2 than I can list the purposes, the tenor of the GPL, the
3 general public license.

4 Now, with respect to estoppel, Mr. Singer suggests
5 again, this isn't raised -- this is raised for the first time
6 now in this point in the proceedings, and that must somehow
7 suggest that there is no merit to the argument, Your Honor.
8 Again the appropriate time to bring a motion as to estoppel is
9 when one understands what's in the case.

10 And finally now we understand what's in the case.
11 And following the Court's directions as to when the motions
12 should be submitted, we brought it. If you'll recall, Your
13 Honor, that we have brought the original motion for summary
14 judgment immediately after filing the case. And it was only
15 because the Court directed, and we respected the direction,
16 that no motion should be filed again until discovery was
17 closed and consistent with the Court's schedule. That can
18 hardly be used as a basis to argue that IBM's motion for
19 estoppel should be denied.

20 Now Mr. Singer suggests, Your Honor, that IBM ought
21 not be allowed to make any allegations here of estoppel
22 because it's a bad actor, and it's supposedly done very bad
23 things in connection with Project Monterey.

24 Well, Your Honor, that's absolutely wrong. But
25 it's all entirely irrelevant because the Monterey allegations

1 to which Mr. Singer refers has nothing whatever to do with the
2 326 lines of code at issue. Nothing whatever to do with that,
3 Your Honor.

4 And Mr. Singer suggests, Your Honor, that somehow
5 SCO should not be held responsible for the acts of its
6 predecessors because they didn't own the copyrights at the
7 time or they didn't know what was going on. Well, Your Honor,
8 the law is clear that a company is bound by the conduct of its
9 predecessors. The law could not be more clear in that regard.

10 And I point you to Page 38 of IBM's reply brief, Judge.

11 Estoppel is a doctrine of equity. And this Court has ample
12 authority under which it exercises its equity to preclude a
13 party that for nearly a decade distributed code under the
14 promise it can be used with all the rights that they had from
15 turning around a decade later under new management from
16 disregarding the representations and warranties made from
17 strategic business agreement, from disregarding the principles
18 set out in the GPL, from disregarding the licenses given under
19 the SBA, from disregarding the licenses given under the
20 UnitedLinux, and pretending as if it's such a surprise to find
21 out that there's a theory in which they think now maybe they
22 can get somebody to maybe pay them some money. Respectfully,
23 Your Honor, if there ever were a case for estoppel, this is
24 the case.

25 Now, with respect to the similarity and

1 protectability, if I can ask Jeff to put up the chart, in
2 effect what Mr. Singer has said, Your Honor, what
3 Mr. Singer -- you may or may not be a baseball fan.

4 THE COURT: I am.

5 MR. MARRIOTT: Your Honor, good. Then you know
6 that the pitcher is number 1 and the catcher is Number 2, the
7 first base is 3 and second 4 and 5 is third and 6 is the
8 short, left is 7, 8 is center field and 9 is right field.

9 THE COURT: I do know that.

10 MR. MARRIOTT: Pardon, Your Honor?

11 THE COURT: I do know that. I've scored a few
12 games even.

13 MR. MARRIOTT: Pardon?

14 THE COURT: I've scored them, you know.

15 MR. MARRIOTT: What SCO contends, Your Honor, let's
16 talk about those. Your Honor, in effect what they have
17 claimed is that the pitcher, player pitcher is 1, player
18 catcher is 2, player first base is 3 and so on. That's what
19 those #defines represent, associating a number and a shorthand
20 for a position and claiming that somehow it renders Linux so
21 substantially similar to UNIX that they enact and claim
22 rights.

23 And I respectfully submit, Your Honor, that the law
24 is clear that short names of that sort and associating
25 integers randomly with phrases like PP1 or EPERM-1 simply is

1 not protectable under the doctrines laid out in our papers by
2 Professors Kernagen and Davis in their expert reports. And in
3 no case can it result when it's 320 lines of non-contiguous
4 essentially random numbers with essentially shorthand phrases
5 represents substantial similarity.

6 Now, Your Honor with respect to misuse, briefly
7 again, the facts here are simple. They claimed rights to more
8 than a million lines of code in Linux. At the end of the day,
9 there's 326 lines of code in which they have rights, and they
10 have sought to exert the supposed monopoly they have and
11 copyrights they claim to have over technology plainly owned by
12 others.

13 For the five reasons I set out, Your Honor, summary
14 judgment respectfully should be entered in favor of IBM.
15 Thank you.

16 THE COURT: Thank you, Mr. Marriott.

17 Now, Mr. Singer, you don't get to reply. Why are
18 you standing up?

19 MR. SINGER: I was hopeful the Court might ask for
20 a sur reply, but I understand I'm out of time.

21 THE COURT: Okay.

22 Now the next motions we have IBM's motion for
23 summary judgment on its claim for copyright infringement, the
24 Eighth counterclaim, and SCO's motion for summary judgment on
25 IBM's Sixth, Seventh and Eighth counterclaim, they ought to

1 argued together, hadn't they?

2 MR. MARRIOTT: They should, Your Honor.

3 MR. NORMAND: Yes, Your Honor.

4 THE COURT: Mr. Normand and Mr. Marriott. How long
5 are we supposed to take on those?

6 MR. MARRIOTT: I think, Your Honor, the agreement
7 was no more than 15 -- was it 20 minutes?

8 MR. NORMAND: 20.

9 MR. MARRIOTT: It may be 20 minutes each.

10 THE COURT: 20 minutes each?

11 MR. MARRIOTT: Yes. I can be briefer than that.

12 THE COURT: And then we have SCO's motion for
13 summary judgment on IBM's Second Third, Fourth and Fifth
14 counterclaim. Who's arguing those? Mr. Hatch? Is that your
15 hand behind that big board there?

16 MS. SORENSEN: And I am, Your Honor.

17 THE COURT: And Ms. Sorenson?

18 MS. SORENSEN: Yes.

19 THE COURT: And how long are we supposed to take on
20 that per side?

21 MS. SORENSEN: 20 minutes each, as well.

22 THE COURT: Let's take a 10-minute break, and we'll
23 come back about 20 to and do these last two arguments, all
24 right?

25 MR. MARRIOTT: Thank you, Your Honor.

1 MR. NORMAND: Thank you, Your Honor.

2 (Recess.)

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1 STATE OF UTAH)
2) ss.
3 COUNTY OF SALT LAKE)

4 I, KELLY BROWN HICKEN, do hereby certify that I am
5 a certified court reporter for the State of Utah;

6 That as such reporter, I attended the hearing of
7 the foregoing matter on March 7, 2007, and thereat reported in
8 Stenotype all of the testimony and proceedings had, and caused
9 said notes to be transcribed into typewriting; and the
10 foregoing pages number from 1 through 64 constitute a full,
11 true and correct report of the same.

12 That I am not of kin to any of the parties and have
13 no interest in the outcome of the matter;

14 And hereby set my hand and seal, this _____ day of
15 _____ 2007.

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KELLY BROWN HICKEN, CSR, RPR, RMR

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